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NO. 89-163

Supreme Court, U.S.

FILED

SEP 11 1989

JOSEPH F. SPANGLER
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Petitioner,

v.

GUADALUPE MONTALVO-MURILLO,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the remedy for noncompliance with the time limits set forth in the Bail Reform Act, 18 U.S.C. 3142(f), is release on conditions.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of Jurisdiction	1
Statement of Facts	2
Reasons for Denying the Writ	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:	Page
<u>United States v. Alaska</u> , 253 U.S. 113 (1920)	5
<u>United States v. Al-Azzawy</u> , 768 F.2d 1141 (9th Cir. 1985)	7
<u>United States v. Clark</u> , 865 F.2d 1433 (4th Cir. 1989)	6
<u>United States v. Hurtado</u> , 779 F.2d 1467 (11th Cir. 1985)	7
<u>United States v. O'Shaughnessy</u> , 764 F.2d 1035, <u>dism. on reh'g</u> , 772 F.2d 112 (5th Cir. 1985)	7
<u>United States v. Sharpe</u> , 470 U.S. 675 (1985)	5
<u>United States v. Vargas</u> , 804 F.2d 157 (1st Cir. 1986)	6
Statutes and Rules:	
Bail Reform Act of 1984, 18 U.S.C. 3141 <u>et seq.</u>	7, 8, 9, 10
18 U.S.C. 3142	7
18 U.S.C. 3142(f)	6, 8, 10
18 U.S.C. 3146	4
18 U.S.C. 3148(b)	4
Miscellaneous:	
Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349 (1974)	10

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Respondent, Guadalupe Montalvo-Murillo, by and through his undersigned attorneys, opposes the Petition for Writ of Certiorari filed by the United States.

JURISDICTION

This Court lacks jurisdiction to review the judgment of the United States Court of Appeals for the Tenth Circuit, because the issue decided by that Court is now moot. See Reasons for Denying the Writ, infra.

STATEMENT OF FACTS

The statement of facts set forth by Petitioner in its brief is in large part accurate. This statement will only clarify the events that occurred after Respondent's return to New Mexico.

Petitioner asserts that on Monday morning, February 13, 1989, an agent with the Drug Enforcement Administration asked the office of the United States Magistrate in Las Cruces, New Mexico, to arrange for Respondent's detention hearing.

Although it appears that a DEA agent contacted the office of the United States Magistrate, the agent who testified at the hearing in district court was not sure whether the Magistrate was informed that the government intended to file a motion to detain, or informed that it had already filed a motion to detain. February 23, 1989, Tr. 96.

In any event, the Magistrate's actions would suggest that he did not know at the time of the hearing on February 16, 1989, that the government had already moved to detain Respondent. The Magistrate continued the detention hearing for three days, and instructed the attorney for the government to

file its motion to detain. February 16, 1989, Tr. 5.¹

On February 16, 1989, counsel for Respondent did not object to the continuance specifically, but objected to the holding of a detention hearing at all. Prior to the detention hearing on February 21, 1989, Respondent filed an opposition to the detention of the defendant without bond, urging that the government's motion to detain, having been filed on February 17, 1989, was untimely.² It was not until the hearing before the district court, on February 23, 1989, that the attorney for the government shared with the court and with the defendant the fact that a motion to detain had been made in Chicago at the defendant's initial appearance.

After his release on bond, Respondent

¹ The government moved for pretrial detention at Respondent's initial appearance in Chicago, although the petition does not expressly state this fact. The government vigorously argued that position before the district court. February 23, 1989, Tr. 9-10. Further, the Court of Appeals found that the government adequately moved for detention in Chicago.

² The written motion to detain was filed on February 17, 1989.

failed to appear for his next court date. As of the filing of this opposition, Respondent is still a fugitive.

REASONS FOR DENYING THE WRIT

1. The issue presented for review by the Petitioner is moot, and therefore this Court does not have jurisdiction to hear this case. The controversy in this case is whether the Respondent should be detained pending trial. Respondent was ordered released on conditions, and subsequently failed to appear in court. The government now has the option of moving to revoke Respondent's release pursuant to 18 U.S.C. 3148(b). There is no requirement that the government wait until the Respondent is rearrested before moving to revoke the release order. In addition, the government could charge Respondent with the separate offense of failure to appear, under 18 U.S.C. 3146, and detain him under that charge when he is arrested. The fact that the government has not taken either of these steps cannot keep this controversy alive. The flight of the Respondent, in violation the conditions of his release, has caused the controversy to come to an end, and this case should be treated as moot. The government may not, by its

inaction, enlarge the power of the Court to decide a moot question. United States v. Alaska, 253 U.S. 113, 116 (1920).

Petitioner relies on this Court's decision in United States v. Sharpe, 470 U.S. 675, 681 n.2 (1985), for the proposition that an appeal is not rendered moot by a respondent's fugitive status. Mootness was not truly an issue in Sharpe, but was discussed because of a series of cases that held that a petitioner's fugitive status would be grounds for dismissing an appeal. The Court distinguished that line of cases from the situation in Sharpe, because denying review to a fugitive petitioner is "based on the equitable principle that a fugitive from justice is 'disentitled' to call upon this Court for a review of his conviction." Ibid. When the government is seeking review, the fugitive status of the respondent is irrelevant under this "equitable principle."

Respondent does not rely on an equitable principle, but on the doctrine of mootness. This case is distinguishable from those which involve the review of a final conviction. There is simply no live controversy for this Court to decide.

2. The Courts of Appeals do not clearly

disagree on the issue presented for review, and the cases cited by Petitioner can be distinguished on their facts from the present case. The First Circuit did not reach the question of the remedy for a violation of the time requirement of section 3142(f) in United States v. Vargas, 804 F.2d 157 (1st Cir. 1986). In Vargas, the court found that the defendant "had a timely opportunity to be heard on the issue of pretrial detention" Ibid at 162. The defendant challenged the adequacy of the detention hearing. The timeliness of the hearing was only challenged based on the defendant's assertion that he had not received an adequate hearing within the time period. Since the court found the hearing adequate, it found that defendant was afforded a timely hearing. The mention in Vargas of the de novo hearing curing the timeliness objection is therefore not a clear statement in conflict with the lower court's holding in the present case.

Neither has the Fourth Circuit ruled on the appropriate remedy for a violation of the time requirements of section 3142(f). In United States v. Clark, 865 F.2d 1433 (4th Cir. 1989), the court found that the defendants waived their right to a timely detention

hearing. In dicta, the court stated that "where the requirements of the Bail Reform Act are not properly met, automatic release is not the appropriate remedy." Ibid at 1436 (citing United States v. Hurtado, 779 F.2d 1467 (11th Cir. 1985)). Yet the court did not reach the question of what the appropriate remedy would be in such a case. The present case may be distinguished further because Respondent was not automatically released. The court set stringent conditions on Respondent's release.

Finally, the Eleventh Circuit has only ambiguously addressed the remedy for an untimely detention hearing in United States v. Hurtado, 779 F.2d 1467 (11th Cir. 1985). In that case, the court found that the detention hearing was untimely, but without explanation, remanded for a de novo hearing under section 3142. The court relied on the Fifth Circuit's decision in United States v. O'Shaughnessy, 764 F.2d 1035, dism. on reh'g, 772 F.2d 112 (5th Cir. 1985), and the Ninth Circuit's decision in United States v. Al-Azzawy, 768 F.2d 1141 (9th Cir. 1985), which both stand for the proposition that a violation of the Bail Reform Act precludes the detention of the defendant. The result the court reached, without explanation, cannot be viewed as a

substantial conflict with the Tenth Circuit's opinion in the present case.

The present case presents such a bizarre fact situation that it is unlikely that a similar case will arise. Procedural errors such as the ones involved here are not bound to occur from time to time. The first error was that the government agents took Respondent to a distant jurisdiction before his first appearance in court. The second error was that the attorney for the government failed to inform the court or counsel for Respondent of the prior filing of a motion to detain until the week after it was filed in Chicago. The errors in this case can hardly be considered the fault of the magistrate. Nor can they be characterized as minor slips. No other court has considered such a blatant violation of the time requirements of section 3142(f).

3. The Tenth Circuit's decision was correct in finding that the only meaningful remedy for a violation of the time requirements of section 3142(f) was release on conditions. The Bail Reform Act does not set forth the remedy for a violation of the "first appearance" requirement because it is not necessary. The mandatory, unambiguous language of the statute states when the

detention hearing shall be held. Logic leads to the conclusion that a detention hearing may not be otherwise held. Congress clearly intended to insure prompt resolution of a person's pretrial detention. To allow a detention hearing at any time outside of the time limits set by Congress, would defeat the legislative intent of the statute. Petitioner suggests a standard of "the earliest practicable opportunity" for the holding of a detention hearing. Congress did not give the government or the court that freedom to decide what was practicable.

Petitioner's argument that Respondent was not prejudiced by the delay, because he would have been detained anyway, is specious.³ The time restrictions in the Bail Reform Act were designed to protect everyone. Petitioner cannot argue that because Respondent was found to be a flight risk, he was not entitled to a timely detention hearing. A similar argument has been made with respect to the protection

³ Petitioner's suggestion that Respondent suffered no prejudice because he somehow waived a prompt detention hearing is not really worthy of reply since the lower court found that there was no such waiver, and since counsel did object to the holding of the detention hearing.

of the Fourth Amendment, i.e., that it only protects the guilty. Professor Amsterdam revealed the fallacy of that argument:

The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 403 (1974). The Tenth Circuit did not fashion an "excessive" or "blunderbuss" remedy for a violation of the time requirement of section 3142(f), but merely reached the only logical conclusion it could. The court of appeals chose to enforce the statute as Congress intended.

CONCLUSION

Petitioner seeks an advisory opinion from this Court as to the proper construction of the time requirements of the Bail Reform Act. In light of the fact that Respondent has violated the conditions of his release, it is inconceivable that he would not be detained if arrested. Since the Court's decision could

not possibly affect the future detention of Respondent, this case is moot and the petition should be denied.

There is no conflict in the courts of appeals on the issue of the remedy for a violation of the time requirements of section 3142(f). The Tenth Circuit's well-reasoned opinion should stand undisturbed.

Respectfully submitted,

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